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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM WAYNE COUNTY CIRCUIT COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., a Michigan non-profit corporation; DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, a Michigan non-profit corporation; ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, a Michigan non-profit corporation; and SIERRA CLUB, a California corporation,

Petitioners-Appellees,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a Department of the Executive Branch of the State of Michigan; and DAN WYANT, Director of the Michigan Department Of Environmental Quality,

Respondents-Appellees,

v.

AK STEEL CORPORATION, a Delaware corporation,

Intervening Respondent-Appellant.

Supreme Court No. 154526
COA No. 326485
Lower Court No. 14-008887-AA

APPELLANT AK STEEL CORPORATION'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

The main thrust of Appellees' Answer to Applications for Leave to Appeal ("Appellees' Answer") is not to defend the holding of the Court of Appeals, but rather to argue that the holding is somehow mere *dicta* and to advance alternative grounds for upholding the Court of Appeals' decision that either were not addressed or were rejected by the Court of Appeals. Thus, contrary to its intended purpose, Appellees' Answer only highlights the need for this Court to grant leave to appeal so that the Court of Appeals' erroneous decision can be examined and this Court can provide clear direction on the issues of significant public interest and legal principles of major significance to the state's jurisprudence raised by the applications for leave to appeal. When this Court grants leave to appeal and hears this appeal on its merits, AK Steel respectfully submits that the Court will conclude that the Court of Appeals' decision cannot be sustained under its own holding or under the alternative theories advanced by Appellees.

ARGUMENT

A. AK Steel's Application for Leave to Appeal is not founded on *dicta* in the Court of Appeals' opinion; it challenges the direct holding on which the Court of Appeals' opinion is based.

Appellees' Answer begins by arguing that AK Steel Corporation ("AK Steel") is challenging *dicta* contained in a footnote of the Court of Appeals' opinion; rather than the holding of the Court of Appeals which determined the issue before it. The rest of Appellees' Answer attempts to convince this Court that the Court of Appeals' opinion can be upheld under alternative theories that the Court of Appeals either rejected or did not address. Both the clear language of the Court of Appeals' opinion and the Appellees' attempts to uphold it based on alternative theories demonstrate that AK Steel is challenging the direct holding of the Court of Appeals' opinion, not *dicta*.

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The issue decided by the Court of Appeals that is the subject of AK Steel's Application is whether the 60-day time period for filing a claim of appeal contained in MCR 7.119 applied to Appellees' appeal of the Michigan Department of Environmental Quality's ("MDEQ") decision to issue Permit to Install No. 182-05C (the "Permit") to AK Steel's predecessor-in-interest Severstal. MCR 7.119 provides: "This rule governs an appeal to the circuit court from an agency decision where [Michigan's Administrative Procedures Act,] MCL 24.201 *et seq.* applies." Therefore, in order to hold that Appellees' time to file their claim of appeal was controlled by MCR 7.119, the Court of Appeals necessarily had to hold that the APA applied to MDEQ's decision to issue the Permit. The Court of Appeals expressly recognized that the fact that the definition provisions of the APA defined "agency" to include the MDEQ was not the end of the inquiry; rather, the APA must apply to MDEQ's decision itself. (Court of Appeals' opinion, at 6, n. 2.) It then reached its holding in the case:

> Here, the issuance of the permit, i.e., the licensing, was required to be preceded by notice and an opportunity for a hearing.[3] Thus, according to MCL 24.291(1), the provisions of the APA that relate to a contested case, i.e., Chapter 4 of the APA, apply. *And because these provisions applied,* that means that the APA applied to the decision to grant PTI 182-05C. *As a result, we hold* that MCR 7.119 governs and that petitioners had 60 days to appeal the DEQ's issuance of the permit to the circuit court.
>
> [3] Indeed, the notice was provided of the public comment period, which was held from February 12, 2014, through March 19, 2014, and of the public hearing, which was held on March 19, 2014.

(*Id.* at 7 & n.3 (emphasis added).) This is the clear holding of the case, not *dicta*. The Court of Appeals relied on the existence of notice of a public comment period and conduct of a public hearing to hold that the provisions of the APA applied to MDEQ's decision to issue the Permit,

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and, therefore, that MCR 7.119 governed the time for appeal. For Appellees to argue otherwise defies the plain language of the Court of Appeals' opinion.

The Appellees seem to recognize this fact elsewhere in Appellees' Answer. For example, in later arguing that AK Steel's predecessor-in-interest was entitled to a contested case hearing, Appellees state that the Court of Appeals "acknowledged (yet again accurately, *albeit for reasons not stated in the opinion*) that the provisions of the APA that relate to a contested case apply." (Appellees' Answer, at 9 (emphasis added)). Appellees further suggest that this Court should affirm the Court of Appeals' holding that MCR 7.119 governed Appellees' appeal of MDEQ's decision, but that this Court should vacate the Court of Appeals' analysis on which the holding was based. (*Id.* at 13.) These statements are tantamount to admissions that the direct holding of the Court of Appeals, not mere *dicta*, is the basis for AK Steel's Application for Leave to Appeal.

B. The fact that MDEQ and the Permit are included within the definitions of "agency" and "license" under the APA does not mean that the provisions of the APA applied to MDEQ's decision to issue the Permit under MCR 7.119.

Appellees offer several alternative grounds to uphold their untimely appeal under MCR 7.119, which the Court of Appeals either rejected or did not address. Appellees begin by arguing that because MDEQ meets the APA definition of an "agency," the Permit meets the APA definition of a "license," and the issuance of the Permit meets the APA definition of "licensing," then the provisions of the APA apply to MDEQ's decision to issue the Permit, thereby triggering the time for appeal contained in MCR 7.119. (Appellees' Answer, at 15-16.) However, the definitional provisions of the APA standing alone are insufficient to make the APA's provisions applicable to MDEQ's decision to issue the Permit as required by MCR 7.119. As set forth above, the Court of Appeals rejected the argument that just because MDEQ is defined by the

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APA as an "agency," the APA then "applies" to MDEQ's "decision" to issue the Permit within the meaning of MCR 7.119. Appellees criticize AK Steel for focusing on whether the APA's contested case provisions applied to MDEQ's decision to issue the Permit, but the contested case provisions were the only provisions of the APA that the Court of Appeals identified as applying to MDEQ's decision. Because no operative provision of the APA applied to MDEQ's decision to issue the Permit in this case, MDEQ's decision was governed solely by the applicable environmental statutes requiring public notice and a public hearing.

Appellees' arguments that the APA "applies" to MDEQ's "decision" to issue the Permit in some generic sense by virtue of the APA's definitional sections, without regard to whether any substantive provision of the APA applies to that decision, lack merit. First, Appellees argue that the Committee Comment on MCR 7.119 confirms that MCR 7.119 is intended to cover all circuit court appeals of decisions made by APA-defined agencies. (Appellees' Answer, at 17-18.) It does nothing of the kind. The Committee Comment only states that not all agencies defined in MCR 7.102(1) are agencies subject to the APA and identifies the types of agencies that are subject to the APA. Although MCR 7.119's catch line is "Appeals from agencies governed by the Administrative Procedures Act," [1] the express terms of terms of MCR 7.119 make clear that it only governs appeals "from an agency decision where [the APA,] MCL 24.201 *et seq.* applies." MCR 7.119(A). Therefore, in order for MCR 7.119 to govern an appeal from MDEQ's decision to issue the Permit, some provision of the APA must be shown to apply to MDEQ's decision to issue the Permit itself. The fact that MDEQ is an "agency" as defined by the APA is insufficient.

[1] As this Court is aware, catch line headings in court rules have no impact on the proper construction of the rules themselves. MCR 1.106 ("The catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates.").

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In fact, when read as a whole, the Committee Comment refutes Appellees' argument. The immediately preceding sentence of the Committee Comment, which Appellees omitted from Appellees' Answer, states that MCR 7.119 is based on the APA, "particularly MCL 24.301, MCL 24.302, and MCL 24.306." MCL 24.301 specifically addresses the right to judicial review for persons "aggrieved by a final decision or order in a contested case;" and MCL 24.302 specifically addresses the manner of judicial review of "a final decision or order in a contested case." MCL 24.306 describes the scope of review for such decisions or orders. Thus, the Committee Comments actually suggest that MCR 7.119 is based on substantive provisions of the APA requiring application of the APA's contested case provisions.

Second, Appellees argue that this Court previously has explained that all decisions by APA agencies are, in some sense, governed by the APA, citing *Westland Convalescent Center v. Blue Cross & Blue Shield of Michigan*, 414 Mich. 247, 273, 324 N.W.2d 851 (1982).[2] (Appellees' Answer, at 18.) However, the holding in that case was simply that a decision of the Insurance Commissioner to approve rates of payment for nursing facilities was not an act of licensing under the APA that required a contested-case hearing prior to a reduction in rates of payment. *Id.* at 272, 324 N.W.2d at 859. The Court made no holding that any provision of the APA was applicable to the Insurance Commissioner's actions in that case.

Third, Appellees argue that the APA applies to an agency decision when all of the definitional elements of a contested case are present, even when the applicable statute refers to a "public hearing," citing *Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing*

[2] Appellees' Answer provides an incorrect citation for the *Westland* case in its Index of Authorities and at page 18 where it is cited by Appellees. The correct citation is in the text above. In addition, Appellees failed to note that the sentence from *Westland* quoted in Appellees' Answer was *dicta* from a plurality opinion authored by Justice Fitzgerald in which only Justice Coleman concurred.

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and Bargaining Board, 416 Mich. 706, 332 N.W.2d 134 (1982). (Appellees' Answer, at 18-19.) While that general proposition may be true, it has no application in this case. The Court in *Michigan Canners* merely held that the board accreditation proceedings at issue required an "opportunity for an evidentiary hearing" where any producer could challenge the evidence supporting the association's request for accreditation. *Id.* at 738-39, 332 N.W.2d at 148. Therefore, the Court concluded that the described hearing was a contested case hearing and the APA was applicable. *Id.* at 739, 332 N.W.2d at 149. Here, the Court of Appeals assumed that the statutory right to a public hearing was the equivalent of an APA contested case hearing, without any analysis whatsoever. As set forth in AK Steel's Application, that assumption cannot withstand scrutiny. The public hearing required in this case was not an evidentiary hearing equivalent of a contested case hearing. (AK Steel's Application, at 8 & 13-15.)

C. Appellees' alternative argument that the APA's contested case provisions applied to MDEQ's decision to issue the Permit because AK Steel's predecessor-in-interest had a right to a contested case hearing if it had disagreed with MDEQ's decision is incorrect.

The Appellees also contend that the Court of Appeals reached the right result for the wrong reason because Appellees believe that AK Steel's predecessor-in-interest, Severstal, had a right to notice and a contested case hearing if it had disagreed with MDEQ's decision to issue the Permit. The Appellees argue that this right is found in either MCL 24.292(1) or Severstal's right to procedural due process. (Appellees' Answer, at 20-22.) Appellees are incorrect.

First, as to MCL 24.292(1), this provision of the APA does not apply. It states, in pertinent part:

> Before beginning proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of the facts or conduct that warrant the intended action.

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> The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license . . .

This provision requires that the action be initiated by the agency. Here, Severstal initiated the action through the submission of an application for the Permit, PTI 182-05C, in accordance with Rule 336.1201(1)(b).[3] The action was not initiated by MDEQ. In addition, the issuance of PTI 182-05C had nothing to do with MDEQ providing Severstal with an opportunity to show it should retain its existing permit to install. Severstal initiated the application for issuance of the Permit precisely because it sought to modify and correct the requirements of PTI 182-05B.[4] MCL 24.292(1) simply does not apply to the PTI proceeding at issue.[5]

Second, the authorities cited by Appellees for the proposition that Severstal had a due process right to notice and a contested case hearing are inapplicable. *See Bisco's Inc. v. Michigan Liquor Control Commission*, 395 Mich. 706, 717-22, 238 N.W.2d 166, 171-73 (1976) (holding that Liquor Control Commission must provide notice and an opportunity for an evidentiary hearing before denial of an application for renewal of a liquor license); *Bundo v. City of Walled Lake*, 395 Mich. 679, 696-97, 238 N.W.2d 154, 162 (1976) (holding that licensee must be provided notice and an opportunity for an evidentiary hearing before local legislative body can recommend non-renewal of liquor license to Liquor Control Commission); *Bois Blanc Island Township v. Natural Resources Commission*, 158 Mich. App. 239, 242-45, 404 N.W.2d 719, 721-22 (1987) (holding that Department of Natural Resources must provide notice and an

[3] *See* PTI Application, AR Permit File, Nos. 53 and 318.
[4] *Id.*
[5] MCL 324.5506(14) likewise did not create a right to a contested case hearing for Severstal. Appellees attempt to read the phrase "revision of any emissions limitation, standard, or condition" out of context in the first sentence of that subsection. The referenced emissions limitations, standards, or conditions are those contained in the operating permits or general permits referenced earlier in that sentence. This statutory provision simply does not relate to the permit to install at issue in this case. It also clearly contemplates a challenge to the revision by an aggrieved owner or operator of an existing source, not a situation where the owner or operator requested the revision.

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opportunity for a contested case hearing under MCL 24.292 before terminating sanitary landfill permits). These cases all involve an agency taking away or refusing to renew an existing license. Here, the situation is completely different. Severstal was the party seeking to revise emission limitations in its existing permit to install. Severstal did not have the right to a contested case hearing even had MDEQ denied the requested modifications. Appellees cite no authority suggesting that an applicant is entitled to a contested case hearing when an agency refuses to grant the applicant's request for a new permit with materially different terms or refuses to grant the applicant's request for revisions to an existing permit that materially change its terms.

Moreover, MDEQ did not deny the modifications requested by Severstal, and Severstal was not an aggrieved party seeking to challenge MDEQ's decision. Appellees argue that this fact is irrelevant, but it is not. There is no due process right or statutory provision requiring MDEQ to provide notice and an opportunity for a contested case hearing to an applicant before granting that applicant's request to modify an existing permit. The only statutory requirement was that MDEQ provide public notice and a public hearing under MCL 324.5511(3).

D. Appellees' argument that other provisions of the APA applied to MDEQ's decision to issue the Permit is incorrect.

The Appellees also incorrectly assert that MCL 24.291(2) applies to MDEQ's decision to issue the Permit. That section of the APA states in relevant part:

> When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of continuing nature, the existing license does not expire until a decision on the application is finally made by the agency . . .

The application for and issuance of the Permit is not covered by MCL 24.291(2) for at least two reasons.

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First, MCL 24.291(2) requires a "timely" and sufficient application. This criterion makes sense in a circumstance where a statute or regulation requires submission of an application within a certain time before expiration. There is nothing timely or untimely, however, about a permit to install application. The submission of a permit to install application to allow for the construction or modification of a source is a one-time action with timing that is entirely at the discretion of the entity submitting the application.[6]

Second, for MCL 24.291(2) to have any relevance, there must be an "existing license" that could otherwise expire but for the protection of this statute. The Appellees do not identify any "existing license." The only possibility could be PTI 182-05B, which is the permit to install that immediately proceeded PTI 182-05C. Unlike an operating permit, however, a construction permit such as PTI 182-05B does not expire. Instead, PTIs are voided, but only in very narrow circumstances when a permittee fails to timely commence construction, the source is shutdown, or a superseding PTI is issued.[7] Thus there is no need for statutory protection to ensure a person can continue to conduct an activity under a PTI while an application is pending, since that PTI cannot expire. As it relates to PTI 182-05B, MDEQ simply voided it concurrently with the issuance of PTI 182-05C. PTI 182-05B could not, and did not, expire.

E. The Court of Appeals properly decided Appellees' alternative argument that their appeal was timely under MCL 324.5505.

Finally, Appellees argue that the Court of Appeals erred in reversing the Circuit Court's decision that the applicable appeal time was the 90-day period provided under Part 55 of NREPA. Appellees state that they "offer this argument both for purposes of issue preservation should leave be granted, and as alternate grounds for affirmance whether leave is granted or not."

[6] *See* Mich. Admin. Code R. 336.1201(1)(b), R. 336.1203 and R. 336.1206.
[7] *See* Mich. Admin. Code R. 336.1201(4)-(6).

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(Appellees' Answer, at 25.) In doing so, Appellees suggest that the Court should peremptorily reverse this part of the Court of Appeals' decision without benefit of full briefing and argument.

AK Steel respectfully submits that a peremptory reversal of this part of the Court of Appeals' decision is inappropriate. The Court of Appeals correctly decided what was an issue of first impression in Michigan. It correctly construed the relevant language of MCL 324.5505(8) and MCL 324.5506(14) in context and in accordance with the rules of statutory construction promulgated by this Court for the reasons set forth in the opinion of the Court of Appeals and contained in the briefs filed by AK Steel below. If Appellees wish to seek reversal of this aspect of the Court of Appeals' decision, AK Steel respectfully submits that it should do so after leave to appeal is granted so that this Court may have the benefit of full briefing and argument on Appellees' alternative ground for relief that was rejected by the Court of Appeals

Respectfully submitted,

DRIGGERS, SCHULTZ & HERBST, P.C.

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Dated: November 23, 2016

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CERTIFICATE OF SERVICE

I certify that on November 23, 2016, I filed the foregoing paper with the Clerk of Court using the Truefiling system which will electronically send notification to all counsel of record.

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